

### **REMARKS/ARGUMENTS**

Claims 1-5 and 8-19 were pending in this application. No claims have been amended, added, or canceled. Hence, claims 1-5 and 8-19 remain pending. Reconsideration of the subject application as amended is respectfully requested.

All claims stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the cited portions of U.S. Patent Publication No. 2002/0091573 to Hodes et al. ("Hodes").

#### **Impropriety of Final Office Action**

The Applicants respectfully traverse the finality of the present Office Action. The pending Office Action was improperly made final (see MPEP § 706.07(a)). Independent claims 17, 18 and 19, for example, remain in original form, yet a new ground for rejection was introduced. Hence, the Applicants' amendments did not necessitate the new ground for rejection of claims 17, 18 and 19. Moreover, claim 1, as amended, is merely original claim 7 rewritten in independent form. Hence, the new ground for rejection of claim 1 was not necessitated by the Applicants' amendments.

#### **Claim Rejections Under 35 U.S.C. § 103(a)**

The Applicants respectfully traverse the rejection of all claims rejected under 35 U.S.C. § 103(a), since the Office Action has not established a prima facie case of obviousness for at least two prongs of the three prong test.

First, the sole reference cited against the claims, Hodes, does not teach or suggest all of the claim elements. Using the language of the Office Action, we will refer to the elements for which a reference does not exist as the "presently added steps." The present Office Action suggests that the "presently added steps" were not present in the original claims. This is incorrect (see original claims 6 and 7). Hence, the present Office Action essentially admits to the invalidity of the first Office Action, which failed to establish a proper 35 U.S.C. § 102(b)

rejection. In any case, the Office Action fails to cite a reference in the prior art for all claim elements, as required for a proper rejection under 35 U.S.C. § 103(a).

If, however, the rejection is maintained in the absence of a reference, then the Applicants respectfully traverse the rejection and request an affidavit in compliance with 37 C.F.R. § 1.104(d)(2), since the rejection appears to be based on facts within the personal knowledge of an employee of the Office. While the Office Action asserts that “such steps are so well known in the art that no additional art need be supplied,” the Applicants are unaware of any examination guideline that removes the examiner’s burden to cite a reference or provide an affidavit in compliance with 37 C.F.R. § 1.104(d)(2). To be clear, even the Examiner’s assertion that the elements are well known in the art requires an affidavit, since the unsupported assertion itself is a “fact[] within the personal knowledge of an employee of the office.”

With respect to another prong of the test for prima facie obviousness, the Office Action fails to provide a motivation in the prior art that one of skill in the art would have been motivated to modify Hodes to supply the missing limitations allegedly well known in the art.

## **Conclusion**

In view of the foregoing, Applicants believe all claims now pending in this application are in condition for allowance and an action to that end is respectfully requested.

Application No. 10/675,924  
Amendment dated January 22, 2007  
Amendment under 37 CFR 1.116 Expedited Procedure  
Examining Group 2614

PATENT

If the Examiner believes a telephone conference would expedite prosecution of this application, please telephone the undersigned at 303-571-4000.

Respectfully submitted,

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/Irvin E. Branch/

Irvin E. Branch

Reg. No. 42,358

TOWNSEND and TOWNSEND and CREW LLP  
Two Embarcadero Center, Eighth Floor  
San Francisco, CA 94111-3834  
Tel: 303-571-4000  
Fax: 415-576-0300  
IEB/jln  
60945789 v1